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Supreme Court, U. S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

LARRY RICH and DENNIS ALLEN ROTH,
PETITIONERS,

v.

STATE OF FLORIDA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT OF APPEAL,
FLORIDA

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ISSUES PRESENTED FOR REVIEW

1. Whether once a ship is reduced to the dominion and control of the authorities, is immobilized and no exigent circumstances remain, may warrantless searches of and seizures from the ship's repositories nonetheless be conducted without offending the Fourth Amendment to the United States Constitution?

2. Whether searches by officers made pursuant to an unconstitutional and invalid administrative regulation authorizing them to conduct warrantless searches without probable cause, articulable suspicion, or any other standard of individualized objective facts can, consistent with the policies of the Fourth Amendment, be validated after the fact by a hindsight judicial determination of probable cause substituted for the officers' own exercise of proper discretion?

3. Whether the administrative law doctrine that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," SEC v. Chenery Corp., 318 U.S. 80, 87 (1947), should be incorporated into Fourth Amendment law as a rule by which the actions of officials should be reviewed at hearings upon a motion to suppress evidence?

4. Whether the initial boarding and search of the ship in this case was supported by probable cause?

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PETITION FOR A WRIT OF CERTIORARI
TO THE SECOND DISTRICT COURT OF APPEAL,
FLORIDA

Larry Rich and Dennis Allen Roth petition for a writ of certiorari to review the judgment of the Florida Second District Court of Appeal in their cases.

OPINIONS BELOW

The Second District Court of Appeal's opinion in Roth v. State, reported at 379 So.2d 794 (Fla. 2d DCA 1979), and its per curiam affirmance in Rich v. State, reported at 380 So.2d 591 (Fla. 2d DCA 1979), appear in the Appendix hereto (App.8-15,7). The orders denying Petitioners' motions to suppress in the trial court also appear in the Appendix hereto (App.1, 2).

JURISDICTION

The judgments of the Second District Court of Appeal in both Rich and Roth were entered November 30, 1979. Timely petitions for rehearing were filed and both denied on January 11, 1980. Thereafter, timely petitions for writs of certiorari were filed with the Supreme Court of Florida, both being denied on July 9, 1980. On August 28, 1980, this Court extended the time in which to file

this joint petition to and including October 4, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens or the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes

Section 370.021, Administration, rules, regulations, etc.

(1) Rules and regulations.--The department of natural resources shall make, adopt, promulgate, amend and repeal all rules and regulations necessary or convenient for the carrying out of the duties, obligations, powers and responsibilities conferred on said department or any of its divisions. The director of each division shall submit to the department suggested rules and regulations for that division. Any person violating or otherwise failing to comply with any of the rules and regulations adopted as aforsaid shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083, unless otherwise provided by law.

* * *

(5) POWERS OF OFFICERS.*

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*This section was amended by Chapter 79-65, Laws of Florida, to omit from second sentence "Department of Marine Resources" and to add in its stead "Department of Law Enforcement".

-The department may designate such employees of the several divisions, as it may deem necessary in its discretion, as law enforcement officers, who shall meet the provisions of s. 943.13 and subsection 943.12(1) and have the powers and duties conferred in this subsection, except that such employees shall comply with the provisions of chapter 943. Such officers, together with the executive director and the director of the Division of Marine Resources, are constituted law enforcement officers of this state with full power to investigate and arrest for any violation of the laws of this state and the rules and regulations of the department under their jurisdiction and for violations of chapter 253 and the rules and regulations promulgated thereunder. The general laws applicable to arrests by peace officers of this state shall also be applicable to such law enforcement officers. Such law enforcement officers may enter upon any land or waters of the state for performance of their lawful duties and may take with them any necessary equipment, and such entry shall not constitute a trespass. It shall be lawful for any boat, motor vehicle, or aircraft owned or chartered by the department or its agents or employees to land on and depart from any of the beaches or waters of the state. Such law enforcement officers shall have the authority, without warrant, to board, inspect,

and search any boat, fishing appliance, storage or processing plant, fishhouse, spongehouse, oysterhouse, or any other warehouse, building, or vehicle engaged in transporting or storing any fish or fishery products. Such authority to search and inspect without a search warrant is limited to those cases in which such law enforcement officers have reason to believe that fish or any saltwater products are taken or kept for sale, barter, transportation, or other purposes in violation of laws or rules promulgated under this law. Any such law enforcement officer may at any time seize or take possession of any saltwater products or contraband which have been unlawfully caught, taken, or processed or which are unlawfully possessed or transported in violation of any of the laws of this state or any rule or regulation of the department. Such law enforcement officers may arrest any person in the act of violating any of the provisions of this law, rules or regulations of the department, the provisions of chapter 253 and the rules and regulations promulgated thereunder, or any of the laws of this state. It is hereby declared unlawful for any person to resist such arrest or in any manner interfere, iether by abetting or assisting such resistance or otherwise interfering, with any such law enforcement officer while engaged in the performance of the duties imposed upon him by law or regulation of the department.

Florida Seafood Quality Control Code

16B-28.23 Inspection of boats engaged in transporting seafood in primary or secondary production.

The Department or its agents shall have authority, without warrant, to board, inspect and search any boat or vehicle engaged in transporting any primary or secondary seafood, as often as may be deemed necessary for enforcement of the provisions of this subsection and for protection of the public health.

STATEMENT OF THE CASE

- - The Search and Seizure- -

This case arose from a search and seizure of a shrimpboat, "The Dudley", by two officers of the Florida Marine Patrol predicated upon the authority of an administrative regulation authorizing agents of the Florida Department of Natural Resources to board, inspect and search boats engaged in transporting seafood as they deemed necessary. Rule 16B-27.23, The Seafood Quality Control

Code. That provision allows warrantless searches without any requirement of probable cause, reasonable grounds, founded suspicion or any other objective restraint upon the discretion of the officers.

On February 21, 1977, "The Dudley", a shrimpboat, was anchored in Charlotte Harbor, located in Lee County, Florida.* The boat was then carrying shrimp nets too large to be used legally for shrimping in Charlotte County (the county adjacent to Lee) but which nets were legal for use in Lee County waters or elsewhere. (Tr.31)

One Marine Patrol officer testified at the suppression hearing that at about 10:40 a.m. that morning, while he and his partner were cruising in a patrol

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*All transcript notations refer to the Transcript of Record in Petitioner Rich's case. Although Petitioner Roth had a separate suppression hearing before another judge, the facts adduced therein are substantially the same.

boat he saw "The Dudley". He observed that it seemed to be riding low in the water, noticed the size of the shrimp nets, and decided to board the boat and check her hold for possible violations of the Seafood Quality Control Act pursuant to the administrative regulation. (Tr.90) The officer further testified that he had premised his right to board "The Dudley" on the belief that this administrative regulation gave him the right to board any commercial vessel within Lee County and search for possible violations of the Act without a warrant, and also because he "felt" like "something" might be on board. (Tr.69)

The officers proceeded to "The Dudley" and requested permission from Captain Larry Rich, Petitioner, to board and inspect the ship. (Tr.27) Captain Rich then explained that no shrimp was aboard and produced the ship's papers which the officers found satisfactory. (Tr.27,

28, 29, 90) Again the officers requested permission to board and, after receiving no response from Captain Rich, boarded "The Dudley" anyway. (Tr. 29) At this time, the officers observed that the shrimp nets on board were dry. (Tr. 89)

Twice permission was requested of Captain Rich to inspect the hold, but the officers received no reply. (Tr. 40) Just as the officers were readying to remove the hatch despite the lack of consent, Petitioner stated, "Well, I might as well tell you, you're going to find out anyway, I've got something illegal down there . . . marijuana." (Tr. 41) Petitioners, along with two other persons found aboard the shrimpboat (Messrs. Henry and Hayden), were then arrested. (Tr.43-44)

After the arrests, and after the officers advised their home base by radio

that both the ship and its occupants were under their control, the officers proceeded to open the hold. (Tr.47) The hold was protected by a larger, heavy outer hatch that required the strength of both officers to lift and by a second smaller hatch. (Tr.40) Once these were opened, the officers observed crocker sacks of what looked and smelled like marijuana.

The ship was then ordered to nearby phosphate docks (Tr.48), the arrestees taken to jail, booked (Tr.50), and their property secured in packages. (Tr.149) "The Dudley" remained under the control and supervision of the Florida Marine Patrol.

While "The Dudley" remained docked, a Florida Marine Patrol investigator, again without a warrant, searched the ship's hold, galley, wheelhouse and cabin, and seized $13,000 found under a mattress in the wheelhouse, and $5,000, a handdrawn

map and a Mastercharge credit card from a drawer in the wheelhouse. (Tr.143, 144) The following day, the suspected marijuana on board "The Dudley" was seized and removed (Tr.139, 143), prior to the issuance of a court order authorizing such action. (Tr.140) Approximately one week later, a further search was made of "The Dudley", this time pursuant to a search warrant (Tr.193-194), and remaining inconsequential evidence was seized. (Tr.152)

- - The Lower Court Decisions- -

Following a suppression hearing in the Circuit Court for the Twentieth Judicial Circuit in and for Lee County, Florida, the Honorable Jack R. Schoonover presiding, the trial court denied Petitioner Rich's motion to suppress. (App.1) (Tr.210) Petitioner Rich then entered a plea of nolo contendere reserving all suppression issues for appellate review, as permitted under Florida law, and was

sentenced to imprisonment of ten (10) years and fined $5,000 for the crime of possession of in excess of one hundred (100) pounds of cannabis, in violation of Section 893.13(1)(a)(2), Florida Statutes (1976). (App.3-4) (Tr.209, 212)

Following a suppression hearing in the Circuit Court for the Twentieth Judicial Circuit in and for Lee County, Florida, the Honorable Thomas W. Shands presiding,* the trial court denied Petitioner Roth's motion to suppress stating

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*The cases of Petitioners Rich and Roth were initially assigned to the same judge. Rich subsequently recused the judge and his case, along with the case of another defendant, Richard Hayden, was reassigned to Judge Schoonover. For the Court's information, Hayden, who was found aboard "The Dudley", went to trial, was convicted and had his conviction affirmed by the same panel of the appellate court on the same day as the Petitioners' herein. His petition for review by the Florida Supreme Court was denied somewhat after the Petitioners' were. He does intend, however, also to seek review from this Court. His petition for a writ of certiorari is presently due on October 14, 1980, and his motion to enlarge the time until November 13, 1980, is pending.

> Gentlemen, I don't know why we even had this hearing. The statute gives the officer the authority to go in. ...I think there is no question they were obligated to search that boat. The statute gives them the power to do so. And to differ with the attorneys, it doesn't say "probable cause" at all. Those words are not used in the statute. It says they have the authority without a search warrant to enter if they believe that fish or any saltwater products are taken or kept on board - -they have that authority. ...I will deny your motion.
>
> (Tr.91-92)

Subsequently, a written order denying Roth's suppression motion was entered. (App.2) (Tr.110) Petitioner Roth thereafter entered a plea of nolo contendere reserving all suppression issues for appellate review, as permitted under Florida law, and was sentenced to imprisonment of 365 days (App.5-6) (Tr.109, 111)

The District Court of Appeal of Florida in and for the Second District affirmed Petitioner Rich's conviction without

opinion (App.7). On the same day the same panel of the same court reversed Petitioner Roth's case and remanded it for and remanded it for a new suppression hearing. Petitioner Roth's case. Dennis Allen Roth v. State, 378 So.2d 794 (Fla. 2d DCA 1979) (App.8-15). In Roth the Court held that the administrative regulation upon which the Marine Patrol had relied in boarding and searching "The Dudley" was invalid and that State law prohibited inspecting and searching boats and vehicles engaged in transporting seafood without probable cause. The opinion stated:

> To the extent that this administrative regulation purports to permit a warrantless search without any probable cause, it is contrary to the controlling statute, Section 370.021(5) [Florida Statutes], and we hereby declare it invalid as beyond the quasi-legislative rule-making authority conferred upon the Department of Natural Resources by the legislature.
>
> (App.14)

The suppression issues raised in both Rich and Roth were identical, as they arose from the same incident. The only distinction which supports the differing treatment of them by the Second District Court of Appeal was the trial court orders denying the motions to suppress. In Roth, the trial court gave a reason for its denial: that the regulation gave the Marine Patrol officers authority to board and search "The Dudley". (Tr.91-92) In Rich, however, the trial court offered no reason for its denial of Petitioner's motion. (App.1)

On January 11, 1980, the Second District Court of Appeal denied Petitioners' timely motions for rehearing.

Petitioners, thereafter, filed timely Petitions for a Writ of Certiorari in the Supreme Court of Florida.

On July 9, 1980, the Supreme Court of Florida entered Orders in the above cases which declared "it appearing to

the Court that it is without jurisdiction, it is ordered that certiorari is denied". (App.18,19) One Justice dissented without opinion in both cases.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT QUESTION OF WHETHER THE REQUIREMENT OF A WARRANT TO SEARCH REPOSITORIES OF PERSONAL EFFECTS FOUND IN AUTOMOBILES SHOULD BE SIMILARLY APPLIED TO THE SEARCH OF REPOSITORIES ABOARD A SHIP

Once the Petitioners were arrested, and "The Dudley" was reduced to the dominion and control of the Florida Marine Patrol, no exigent circumstances remained to excuse the failure to obtain a judicial warrant before searching the repositories of the ship; specifically the ship's hold, galley, wheelhouse and cabin. Nevertheless, the trial court upheld the searches and seizures.

This Court has recently struggled with the limits of the mobility exception

to the warrant clause of the Fourth Amendment. In Arkansas v. Sanders, 442 U.S. 753 (1979), the Court noted that (1) the "automobile exception" "does not invariably apply whenever automobiles are searched," id. at 760 n.7; (2) "the reach of each exception" to the warrant clause is limited "to that which is necessary to accommodate the identified needs of society" supporting that exception, id.; (3) the "exigency of mobility must be assessed at the point immediately before the search - - after the police have seized the object to be searched and have it securely within their control", id. at 763; and (4) the right to seize the vehicle is indeed the lesser intrusion where the contained object, or repository, thereby detained carries a higher expectation of privacy than the vehicle itself. Id. at 764-65 & n.13. Assuming, arguendo, that the mobility exception applies not only to cars but also to ships as well,

the guiding principles announced in Sanders, applied to the facts in the instant case, require suppression of the evidence. The warrantless searches and seizures in this case were an unconstitutional deprivation of the Petitioner's rights and that the trial courts were in error when they denied Petitioners' motions to suppress.

Here, the officers themselves announced to their home base by radio that the Petitioners had been arrested and "The Dudley" was under their control prior to their actual search of the hold. Thus, they admitted that exigencies no longer existed to support a warrantless intrusion. The hold, which they then searched, was secured by a larger, heavy outer hatch that required the strength of both officers to lift and by a second smaller hatch. Clearly, its contents were meant to be kept from the indiscriminate eye and the possible probing of stran-

gers. The ship itself constituted the living quarters of its crew members and was a repository for their personal effects. The Petitioners had the reasonable expectation that the inner enclosures of the ship would be as secure from warrantless intrusions as any home would be. Therefore, Petitioners contend the warrantless search of the hold after the ship was securely seized and placed under the dominion and control of the officers and the warrantless searches of and seizures from the ship's hold, galley, wheelhouse and cabin later once "The Dudley" had been securely docked at nearby phosphate docks, were constitutionally unreasonable under the rationale of Arkansas v. Sanders, 442 U.S. 753 (1979).

The Petitioners' federal constitutional claims for suppression of evidence were raised in a timely manner in the trial court and have been argued and preserved

ever since. If a warrant is ever required to search and make seizures from any part of a boat, this is the case since all of the State's physical evidence against Petitioners' was seized from "The Dudley" after it had been placed under the dominion and control of the authorities, docked, guarded and thus plainly immobilized.

However, the matter of vessel searches has not been addressed by this Court, and basic legal questions thus remain unanswered. Does the mobility exception to the warrant clause, announced by this Court in the context of automobiles, Carroll v. United States, 267 U.S. 132 (1925), Chambers v. Maroney, 399 U.S. 42 (1970), apply with lesser, equal or greater force to searches and seizures of vessels? Once a boat has been reduced to the dominion and control of law enforcement authorities and thus immobilized, do the ship's hold and all other repositor-

ies of personal effects deserve protection under the warrant clause similar to that announced by this Court in Arkansas v. Sanders, 442 U.S. 753 (1979), and United States v. Chadwick, 433 U.S. 1 (1977)? Or, because of the unique privacy interests of vessels, upon which persons live and work and the peculiar mobility of ships, should new standards of Fourth Amendment law be fashioned to deal with searches of a vessel's repositories?

These are serious and basic issues of federal constitutional law not yet resolved by this Court. Boat searches have been burgeoning in recent years and are spawning much litigation and controversy. See generally Note, High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea, 93 Harv.L.Rev. 725-751 (1980); Comment, At Sea With The Fourth Amendment, 32 U.Miami L. Rev. 51 (1977). This case presents an opportunity to decide the

threshold question of whether the warrant requirement of the Fourth Amendment ever applies to boats and to explore further the extent of the mobility exception to it. Thus, certiorari should be granted to resolve questions of federal law which are important practically and doctrinally as well.

II.

CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE FOR THE FIRST TIME WHETHER AN UNCONSTITUTIONAL SEARCH AND SEIZURE MAY BE RESUSCITATED BY A HINDSIGHT JUDICIAL DETERMINATION OF PROBABLE CAUSE

Important, basic questions of federal constitutional law are raised by the Florida Marine Patrol officers' searching pursuant to an invalid regulation. The officers believed that the had carte blanche to conduct administrative searches for Seafood Quality Control Code violations whithout any necessity for probable cause, founded suspicion or any other

individualized objective facts to justify the intrusion. Indeed, they planned to search "The Dudley" before they observed anything about it other than that it was a shrimpboat. The Second District Court of Appeal, of course, held in Roth that the administrative regulation was invalid since it did not require "probable cause." Roth v. State, 378 So.2d 794 (Fla. 2d DCA 1979). But the panel affirmed Petitioner Rich's conviction and remanded Petitioner Roth's case with instructions to conduct a new suppression hearing rather than with instructions to suppress the evidence. Thus these cases squarely raise the question of when, if ever, may a court validate a search and seizure by substituting its judicial judgment as to both factual and legal issues, all after the fact and in place of the judgment of officers actually in the field correctly exercising their expertise and discretion?

In the present case, the officers conducted an administrative search under a regulation comparable to a general warrant and, indeed, to the "writs of assistance" which necessitated the Fourth Amendment in the first place. See Stanford v. Texas, 379 U.S. 476 (1969). We contend that when, under the objective facts, it would be within the discretion of officers applying correct legal standards either to search or not to search, it violates the Fourth Amendment for a court to uphold the search. To begin with, the Fourth Amendment confers a right upon every citizen to his privacy protected in the first instance by the constitutionally informed discretion of law enforcement officers. Moreover, it is unreasonable under both the Fourth and Fourteenth Amendments to countenance after the fact judicial guesswork to validate searches which in truth have been conducted unlawfully. What if a

search is concededly and wholly grounded upon a policy of harassing certain groups on account of race, national origin, sex, religion or political belief? What if a seemingly valid ground is found to be a sham or pretense for such unlawful grounds? See, e.g., United States v. Cruz, 581 F.2d 535 (5th Cir. 1978).

Such "afterthought" efforts to salvage a search have been condemned by some of the lower courts. E.g., United States v. Perez-Vega, 250 F.Supp. 429, 431, 432 n.4 & 433 (D.P.R. 1966); United States v. Branch, 545 F.2d 177, 186 n.24 (D.C.Cir. 1976) ("[a] lack of probable cause cannot be made up in hindsight by a hypothetical variation in the basis on which a search was conducted.") (quoting United States v. Cunningham, 424 F.2d 942, 943 (D.C.Cir.), cert. denied, 399 U.S. 914, 90 S.Ct. 2218, 26 L.Ed.2d 572 (1970). We contended in every court below and will contend in the Supreme Court that the issue is

governed by the principle set forth in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) (Court will not examine the sufficiency of the facts to justify issuance of search warrant where governing statute establishes unconstitutional guidelines). However, this specific issue -- hindsight probable cause assessment where a statute relied upon for authority to search is unconstitutional -- has never been decided by the Supreme Court, and that Court's decisions dealing with similar legal issues offer no clearcut guidelines.

This Court has in dicta expressed its refusal to engage in such hindsight constructions of probable case. Jones v. United States, 357 U.S. 493, 500 (1958) (court refused to entertain government theory, as the dissenters urged, that warrantless search of house could be sustained by justifying it as a search incident to arrest where "testimony of

the federal officers makes clear beyond dispute that their purpose in entering was to search . . . and not to arrest petitioner," even though admittedly the officers had probable cause to arrest). Further, this Court's oft-repeated preference for warrants, see, e.g., Katz v. United States, 389 U.S. 347, 357 (1967) ("search conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment. . ") has been predicated upon a policy to deter the kind of invitation to hindsight probable cause determinations as the instant cases present. See, e.g., Beck v. Ohio, 379 U.S. 89, 96 (1964) ("An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influ-

enced by the familiar shortcomings of hindsight judgment.") Accord United States v. Watson, 423 U.S. 411, 432 n.6 (1976) (citing Beck, supra); United States v. United States District Court, 407 U.S. 297 (1972); United States v. Ventresca, 380 U.S. 102 (1968); Katz v. United States, 389 U.S. 347, 358 (1967) ("antecedent justification" is central to the Fourth Amendment).

This Court's decision in Berger v. New York, 388 U.S. 41 (1967) seems implicitly to condemn resuscitating an unconstitutional search by an independent judicial assessment of debatable facts to find probable cause. See also Torres v. Puerto Rico, 442 U.S. 465 (1979); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Sibron v. New York, 392 U.S. 40 (1968) (cases following Berger, supra, and holding that suppression is required where searches are carried out pursuant to statutes, previously not found unconstitu-

tional, which purport to authorize searches without probable cause). Some of this Court's recent decisions, however, seriously put into question whether these policies still prevail. See, e.g., Michigan v. DeFillipo, 433 U.S. 31 (1979) (no suppression required where search is pursuant to an arrest for violation of statute later found constitutional); United States v. Robinson, 414 U.S. 218, 236 (1973) (rejecting, inter alia, the notion that the motivation of the search must coincide with the legal justification); Scott v. United States, 436 U.S. 128, 138 & n.12 (1978) (probable cause determined "under standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved"). Thus, Petitioners present important, basic and difficult questions of federal constitutional search and seizure doctrine which have never been but should be settled by the Supreme

Court of the United States. Further, if certiorari is granted, we believe that Petitioners will succeed in convincing this Court that the same basic policy which prohibits "dragnet" arrests, searches and seizures prohibits courts from validating them after the fact on debatable grounds which the officers never contemplated in the first place.

III.

CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE WHETHER BASIC PRINCIPLES OF ADMINISTRATIVE LAW, SPECIFICALLY THE CHENERY DOCTRINE, SHOULD APPLY TO JUDICIAL REVIEW OF SEARCHES AND SEIZURES

Other basic principles of law are also thwarted by allowing a trial court to substitute its judgment for that of an administrative factfinder. Petitioner has contended in all courts below that the Chenery doctrine should apply to administrative searches and seizures and that "hindsight" and "afterthought"

justifications relied upon by a court cannot be substituted for the original exercise of informed expertise and discretion by the administrative officers acting in the field. Compare SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1947) (underscoring a basic proposition of administrative law that "[T]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based") with K. Davis, Discretionary Justice: A Preliminary Inquiry 222 (1969) (advocating standard administrative law policies be applied to police action to limit unbridled discretion). Since the officers herein expressly based their decision to search the vessel upon the carte blanche regulation, the Second District Court of Appeal's decision invalidating the regulation in Petitioner Roth's case should have ended the judicial inquiry into the search and seizure. Instead, the

panel affirmed Petitioner Rich's conviction, presumably based upon its speculation that if the officers had applied their discretion under a correct probable cause standard they might have searched anyway and its conclusion that such a hypothetical decision by the officers would not have been an abuse of discretion. The panel's approval of judicial hindsight decision-making and its rejection of the Chenery doctine is made clear by the remand of Petitioner Roth's case for a new suppression hearing. Chenery, of course, condemns such "second-guessing."

Many authorities have urged the adoption of administrative law principles to govern police actitivities, primarily to narrow the area of discretion of law enforcement personnel by administrative rule-making procedures. E.g., K. Davis, Discretionary Justice: A Preliminary Inquiry (1969); McGowan, Rulemaking and the Police, 70 Mich. L. Rev. 659 (1972);

Caplan, The Case for Rulemaking by Law Enforcement Agencies, 36 Law & Contemp. Prob. 500 (1971); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 335 (1974); ABA Comm. on the Police Function, Standards Relating to the Urban Police Function, Part IV, Law Enforcement Policy-Making (tent. draft 1972, approved by ABA House of Delegates, February, 1973). With the modern growth of administrative search authorization and the attempted professionalization of many police departments, rules and regulations governing arrests, inspections, searches and seizures are becoming more and more common. The instant case presents an opportunity for this Court to explore applicability of standard administrative law to review of the new Fourth Amendment rulemaking development.

IV.

CERTIORARI SHOULD BE GRANTED SINCE THE UPHOLDING OF THE SEARCHES AND SEIZURES IN THESE CASES CONFLICTS WITH SUPREME COURT PRECEDENT AND VIOLATES THE FOURTH AMENDMENT

Petitioners contend finally that the marine patrol officers did not have reasonable grounds to board and search "The Dudley" and that their actions violated the Fourth and Fourteenth Amendments to the United States Constitution. Thus, even if the judiciary should ever assume the role of justifying debatable searches and seizures after the fact when the officers in the field never weighed the facts in the first instance, the convictions herein must still be reversed. The facts did not warrant the intrusion.

Parenthetically, the standard of reasonable grounds governing in this case is probable cause since State law § 370.021(5), Fla.Stat. (1976), has dictated that expectation of privacy. Moreover, tradi-

tional probable cause would govern in any event since we are dealing with a boat on inland waters. See United States v. Ortiz, 422 U.S. 891, 896-97 (1975); Carroll v. United States, 267 U.S. 132 (1925).

In order to validate the warrantless search of "The Dudley", the facts before the Florida Marine Patrol officers must have established probable cause to believe that violations of the Seafood Quality Control Code existed aboard "The Dudley" at the time of the search. To determine whether there was probable cause to make a search without a warrant, the Court must first determine the sufficiency of the knwoledge of the officers by a comparison as to what a reasonable person, knowing all the facts which the officers knew, would have believed under all the circumstances. Henry v. United States, 361 U.S. 98 (1959).

The record indicates that the officers

were acting under the Seafood Quality Control Code (Tr.43); therefore, the facts before them must have indicated (1) there were shrimp aboard "The Dudley" (2) in violation of the Code.

The fact that "The Dudley" was a larger boat than usually found in Charlotte Harbor is no basis for probable cause. First, according to the testimony of Captain Wheeler, a witness at the suppression hearing and a charter boat captain in the Boca Grande area for 41 years, it is not uncommon to find shrimp boats as large as "The Dudley" in Charlotte Harbor. As he put it, "They're so common, though, that it doesn't register with you, really, because you see them every day, as a rule. It just don't register with you." (Tr.189). Second, even if a large boat in Charlotte Harbor were uncommon, it is irrelevant. Cf., United States v. Brigoni-Ponce, 422 U.S. 873 (1975) (rejection of inference that per-

sons who look like they are of Mexican extraction are thus illegal aliens). The irrelevance of the fact that "The Dudley" was a shrimpboat to supply probable cause is especially pronounced in light of the previous day's weather conditions. The record indicates that there had been a strong northwestern wind previous to the day "The Dudley" was seized. One marine patrol officer testified that the seas in the Gulf had been rough (Tr. 86-87), and as Captain Wheeler testified, "all shrimp boats, if they're 45 to 80 feet, would be inside [during] a Nor'wester" in Charlotte Harbor (Tr.185). The officers should have expected to see nonlocal boats the size of "The Dudley" anchored in the harbor.

Equally irrelevant is the fact that the nets on "The Dudley" were larger than those allowed in Charlotte County. The record clearly indicates that "The Dudley" was not in Charlotte County,

but rather, was in Lee County. (Tr.34) Also, the vague claim that unspecified complaints had been received from unspecified persons about the taking of small shrimp off the bottom of Charlotte Harbor amounts to no more than rank speculation and of course cannot be the basis for probable cause. Compare Almeida-Sanchez v. United States, 413 U.S. 266, 275, 283-285 (1975) (Mr. Justice Powell, concurring) with Davis v. Mississippi, 394 U.S. 721, 727-28, (1969).

Moreover, the fact that "The Dudley" appeared to be sitting low in the water is no basis for probable cause. "The Dudley" could have simply been transporting cargo or could have simply been taking on water.* Moreover, had "The Dudley"

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*If this could be characterized as leading to the possibility that contraband was aboard, we should like the opportunity to urge that a search for contraband on the pretext of an administrative search for seafood violations violates the Fourth Amendment.

been loaded with shrimp, there should have been evidence of shrimping activity present. But, to the contrary, the nets were dry (Tr.89) and presumably free of any debris such as grass, crabs and fish which are normally caught and remain in the nets when shrimping (see Tr.189). In fact, one marine patrol officer testified that he boarded "The Dudley" to inspect for possible violations, not because there were facts which reasonably led him to believe there were violations on board (Tr.28, 64, 66-7, 69, 75, 100), but rather because he "felt" like "something" might be on board (Tr.69). Even at that point in time after he had checked out the ship's papers satisfactorily and was preparing to board anyway, he, in his own words, "wasn't concerned with the shrimp landing permit because I didn't know whether they had shrimp on the boat - - aboard or not." (Tr.28)

Under these facts, its was unjustified for the officers to disbelieve the Captain's statement that there were no shrimp on board. That Rich was silent in the fact of some of the officers' demands is beside the point. It surely does not amount to probable cause. Cf. Brown v. Texas, 443 U.S. 47 (1979). Captain Rich readily complied with the officers' request to produce his ship's papers and answered the questions concerning the reason "The Dudley" was anchored in Charlotte Harbor and whether he had shrimp on board. (Tr.27, 28, 29, 90) Certainly, the Captain was not required to carry on a friendly conversation with the officers, and neither was he required to invite them aboard his boat.

In conclusion, it is apparent that there was no reasonable grounds or probable cause for prudent Florida Marine Patrol officers to believe that "The

Dudley" had committed a violation of the Seafood Quality Control Code. At best, the officers were acting on the basis of a hunch, a feeling that cannot rise to the dignity of an articulable suspicion let alone probable cause. Delaware v. Prouse, 440 U.S. 648, 661 (1979); Terry v. Ohio, 392 U.S. 1, 22 (1968).

Therefore, the trial courts' denial of Petitioners' motions to suppress, and the Second District Court of Apeal's summary affirmance of Petitioner Rich's conviction violates the Fourth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,*

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*Counsel gratefully acknowledges the assistance of Laurel D. White, third year student at the University of Miami School of Law.

A P P E N D I X

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA

vs. CASE NO. 77-185CF TWS

LARRY RICH

ORDER

THE Defendant's Motion to Suppress Evidence in Unlawful Search having come on for hearing, and the Court having been advised in the premises on both the facts and the law respecting the said Motion, it is therefore,

ORDERED AND ADJUDGED that the aforesaid Motion is Denied.

DONE AND ORDERED, in Chambers, at Fort Myers, Lee County, Florida this 4th day of October, 1977.

"ss/ Jack R. Schoonover"

* * * *

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA
CRIMINAL

STATE OF FLORIDA

vs. CASE NO. 77-186CF-TWS
77-187CF-TWS

DENNIS ROTH
DENNIS HENRY

ORDER

Having heard the evidence and argument of counsel and being otherwise advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendant's Motions to Suppress Evidence In Unlawful Search heard together are hereby denied.

DONE AND ORDERED in Chambers, at Fort Myers, Lee County, Florida, this 1st day of July, 1977.

"ss/ Thomas W. Shands"

* * * *

SENTENCE AND JUDGMENT FORM

* * * *

LEE COUNTY CIRCUIT COURT MINUTE
BOOK 22 PAGE_____

STATE OF FLORIDA)
)
vs.) CASE NO. 77-185CF JRS
)
LARRY RICH)
Defendant

The State appeared by its Assistant State Attorney, Peter D. Ringsmuth.

The Defendant appeared in person in open court and with his attorney, Joseph A. Beeler, Esquire, having entered his plea OF NOLO CONTENDERE as to COUNT III on September 28, 1978.

The defendant being before the court, in person, in custody, in open court was informed of the accusation against him and of the judgment and penalty and his right of appeal therefrom, and was asked by the Court whether he had any cause to show why the judgment of the Court and the sentence of the law should not now be pronounced upon him, and he saying nothing sufficient, The Court pronounced the following judgment and sentence upon him:

You having ****plead nolo contendere to the offense of POSSESSION OF IN EXCESS OF ONE HUNDRED (100) POUNDS OF A CONTROLLED SUBSTANCE.

It is the judgment of this court that you are guilty of this said offense,

and it is the judgment of the Court and the sentence of the law, that you, LARRY RICH for your said offense, do be punished by confine-

ment in the State Prison for a period or term of TEN (10) years with credit of 5 days for time served and that you pay a FINE of $5000.00 to the LEE COUNTY FINE & FOREFITURE FUND.

You are remanded to the custody of the sheriff of Lee County, Florida.

Date: February 3, 1978

"ss/ Jack R. Schoonover "

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* * * *

Form 305 CR

STATE OF FLORIDA)
)
vs.)
)
DENNIS ALLEN ROTH)
)
Defendant

Case No. 77-186CF TWS

The State appeared by its Assistant State Attorney, Peter D. Ringsmuth.

The Defendant appeared in person in open court and with his attorney, David L. Orosz, Esquire, having entered his plea of NOLO CONTENDERE on June 21, 1977.

The defendant being before the court, in person, in custody, in open court was informed of the accusation against him and of the judgment and penalty and his right of appeal therefrom, and was asked by the Court whether he had any cause to show why the judgment of the Court and the sentence of the law should not now be pronounced upon him, and he saying nothing sufficient, The Court pronounced the following judgment and sentence upon him:

You having ***plead nolo contendere to the offense of I BRINGING INTO STATE A CONTROLLED SUBSTANCE, II POSSESSION OF IN EXCESS OF 100 POUNDS OF A CONTROLLED SUBSTANCE.

It is the judgment of this court that you are guilty of this said offense, and it is the judgment of The Court and the sentence of the law, that you, DENNIS ALLEN ROTH, for your offense, do be confined in THE LEE COUNTY JAIL and employed at hard labor for a period of term of -365- days with credit of five (5)

days for time served.

You are herewith remanded to the custody of the sheriff of Lee County, Florida.

Date: September 26, 1977

"ss/ Thomas W. Shands"

* * * *

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

LARRY RICH, Appellant,	)	
v.	)	CASE NO. 79-244
STATE OF FLORIDA, Appellee.	)	

Opinion filed November 30, 1979

Appeal from the Circuit Court for Lee County; Jack R. Schoonover, Judge.

Joseph Beeler, Miami, for Appellant.

Jim Smith, Attorney General, Tallahassee, and Richard G. Pippinger, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed.

GRIMES, C.J., and BOARDMAN and RYDER, JJ., Concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

DENNIS ALLEN ROTH, Appellant,	)	
v.	)	Case No. 79-243
STATE OF FLORIDA, Appellee.	)	

Opinion filed November 30, 1979

Appeal from the Circuit Court for Lee County; Thomas W. Shands, Judge.

Joseph Beeler, Miami for Appellant.

Jim Smith, Attorney General, Tallahassee and Robert J. Landry, Assistant Attorney General, Tampa, for Appellee.

RYDER, Judge.

On the morning of February 21, 1977, believing there was a violation of the Laws of Florida pertaining to seafood quality control, Florida Marine Patrol Officers approached the

The Dudley, a shrimp boat at anchor in Charlotte Harbor, boarded it, conducted a search without a warrant and seized a large quantity of marijuana from the hold. Several individuals on board The Dudley, including appellant, were arrested.

Thereafter, appellant was charged by a two count information with feloniously bringing cannabis into Florida and felonious possession of cannabis in excess of 100 pounds, violations of Section 893.13, Florida Statutes. Appellant pleaded not guilty and moved to suppress all evidence on the grounds that it was obtained by an unlawful search and seizure. An evidentiary hearing on appellant's motion to suppress was held on June 20, 1977. In sum, the Florida Marine Patrol Officers testified they believed at the time they boarded The Dudley that shrimp or other seafood was unlawfully on board and/or that there was a violation of seafood quality control. The officers also testified as to their reasons for arriving at this belief. Testimony was

also given regarding the seizure of the quantity of marijuana from The Dudley's hold.

At the conclusion of the suppression hearing, the trial judge stated, "Gentlemen, I don't know why we even had this hearing. The statute gives the officer the authority to go in. ...I think there is no question they were obligated to search that boat. The statute gives them the power to do so. And to differ with the attorneys, it doesn't say 'probable cause' at all. Those words are not used in the statute. It says they have the authority without a search warrant to enter if they believe that fish or any saltwater products are taken or kept on board -- they have that authority. ...I will deny your motion." Subsequently, a written order denying the motion to suppress evidence was entered.

Appellant then changes his plea of not guilty to nolo contendere, reserving the right to appeal the issue of the denial of his motion to suppress. Appellant was adjudicated guilty and sentenced to a term of 365 days in

the Lee County Jail.

Appellant now challenges the denial of his motion to suppress evidence and advances several points of argument. We hold that error of reversible proportions occurred and remand for a new hearing on the suppression motion.

With due respect, it is our view that the trial court misconstrued and misapplied the law by failing to employ the standard of probable cause in determining the suppression issue, as mentioned above. The statute referred to by the trial judge which is material to a disposition of this case is Chapter 370, "Saltwater Fisheries and Conservation", charging the Department of Natural Resources with various duties and empowering the Department and its officers with certain necessary authority. Specifically, Section 370.021(5), Florida Statutes (1977) provides in pertinent part:

> "(5) POWERS OF OFFICERS. - The department may designate such employees of the several

> divisions, as it may deem necessary in its discretion, as law enforcement officers ....of this state with full power to investigate and arrest for any violations of the rules and regulations of the department under their jurisdiction... . Such law enforcement officers shall have the authority, without warrant, to board, inspect, and search any boat... or vehicle engaged in transporting or storing any fish or fishery products. Such authority to search and inspect without a search warrant is limited to those cases in which such law enforcement officers have reason to believe that fish or any saltwater products are taken or kept for sale, barter, transportation, or other purposes in violation of laws or rules promulgated under this law. ...Such law enforcement officers may arrest any person in the act of violating any of the provisions of this law, rules or regulations of the department, ... or any of the laws of this state."
> [Emphasis added.]

Although the trial court correctly noted that the statute quoted above does not expressly use the term "probable cause", it erred in apparently overlooking the case of

Hill v. State, 238 So.2d 608 (Fla. 1970) in which the Florida Supreme Court construed Section 370.021(5), Florida Statutes (1967), which did not differ in any material way from the current section. Our supreme court held that the "reason to believe" limitation on the authority of the officers to search the boat, without a search warrant, was equivalent to a requirement of probable cause to believe that a conservation rule or law was being violated.

Thus, a determination of whether the marine patrol officers had the lawful statutory authority pursuant to Section 370.021(5) to search The Dudley without a warrant depends upon whether the officers had probable cause to do so. The trial court erred by not applying this standard to the evidence adduced.

In this regard, we note here that the legal authority of the marine officers to search the boat without warrant must derive from Section 370.021(5), Florida Statutes, quoted above, and not from the particular rule adopted by the Department of Natural Resources

on the same point, to wit, Seafood Quality Control Code Rule 16B-27.23 which states:

> "Inspection of boats engaged in transporting seafood in primary or secondary production.
>
> The Department or its agents shall have authority, without warrant, to board, inspect and search any boat or vehicle engaged in transporting any primary or secondary seafood as often as may be deemed necessary for enforcement of the provisions of this subsection and for protection of the public health."

To the extent that this administrative regulation purports to permit a warrantless search without any requirement of probable cause, it is contrary to the controlling statute, Section 370.021(5), and we hereby declare it invalid as beyond the quasi-legislative rule-making authority conferred upon the Department of Natural Resources by the legislature. This fundamental principle of law is stated in 2 Am.Jur.2d Administrative Law § 300 (1962),

"Administrative rules and regulations, to be

valid, must be within the authority conferred upon the administrative agency. ...To the extent that a regulation is not in conformity with the statute and with controlling judicial interpretations of the statute it conflicts with the meaning of such statute and so is unauthorized; and regulations must conform, not only with the statute under which they are issued, but also with the constitution and other laws." See also DeThorne v. Beck, 280 So.2d 448 (Fla. 4th DCA 1973); Florida Growers Coop Transport v. Department of Revenue, 273 So.2d 142 (Fla. 1st DCA 1973).

In view of this disposition of this cause, we need not address the other arguments raised by appellant.

Accordingly, we REVERSE the judgment and sentence appealed from and REMAND this cause for a new hearing on appellant's motion to suppress in accord with the standards set forth in this opinion.

GRIMES, C.J., and BOARDMAN, J., Concur.

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

JANUARY 11, 1980

LARRY RICH,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 79-244
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Counsel for appellant having filed a motion for rehearing in the above-styled cause, upon consideration, it is

ORDERED that said motion is hereby denied.

* * * *

IN THE SECOND DISTRICT COURT OF APPEAL,
LAKELAND, FLORIDA

January 11, 1980

DENNIS ALLEN ROTH,	)	
	)	
Appellant,	)	
	)	
v.	)	Case No. 79-243
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
	)	

Counsel for appellant and appellee having filed motions for rehearing in the above-styled cause, upon consideration, it is

ORDERED that said motions are hereby denied.

* * * *

SUPREME COURT OF FLORIDA

Wednesday, July 9, 1980

LARRY RICH, Petitioner, vs. STATE OF FLORIDA, Respondent.	CASE NO. 58,662 District Court of Appeal, 2nd District Case No. 79-244

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R.App.P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

BOYD, OVERTON, ALDERMAN and MCDONALD, J.J., Concur
ADKINS, ACTING C.J., Dissents

* * * *

SUPREME COURT OF FLORIDA

Wednesday, July 9, 1980

DENNIS ALLEN ROTH, Petitioner,	)	
vs.	)	CASE NO. 58,660
STATE OF FLORIDA, Respondent.	)	District Court of Appeal, 2nd District Case No. 79-243

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R.App.P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla.R.App.P. 9.330(d).

BOYD, OVERTON, ALDERMAN and McDONALD, JJ., Concur
ADKINS, ACTING C.J., Dissents

* * * * .

SUPREME COURT OF THE UNITED STATES

No. A-193

LARRY RICH AND DENNIS ALLEN ROTH,

Petitioners

v.

FLORIDA

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 4, 1980.

/s/ Lewis F. Powell, Jr.
Associate Justice of
the Supreme Court of
the United States

Dated this 28th
day of August, 1980.